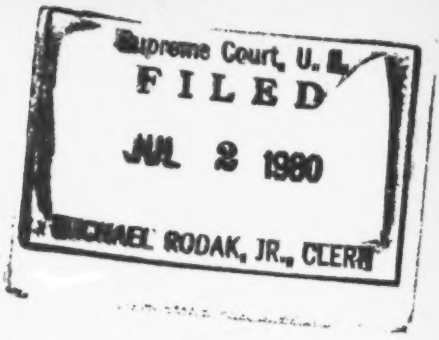

80-2

CASE NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

FRANKLIN D. SMITH,
Petitioner,

v.

CHRYSLER CORPORATION,
Respondent.

On Writ of Certiorari
To the United States Court of
Appeals for the Fifth Circuit

PETITION FOR CERTIORARI

JOSEPH H. KING, JR.
Attorney for Petitioner

967 Juniper Street, N.E.
Atlanta, Georgia 30309

(404) 881-1700

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QUESTIONS PRESENTED FOR REVIEW

In this employment discrimination case, a basic and simple issue, and a related procedural question, are presented:

> (1) Must the plaintiff in an employment discrimination case prove, as part of his "prima facie case", the race of the individual actually given the employment for which he was rejected?
>
> (2) Did the Court of Appeals err in affirming the trial court's involuntary dismissal of the plaintiff's complaint prior to the presentation of the defendant's evidence?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those listed in the caption.

OPINIONS BELOW

The judgment of the Court of Appeals is noted at 516 F.2d 566; no citation is yet

available for the order denying rehearing. However, neither of the Court of Appeals' opinions, nor either of the trial court opinions, is published.

JURISDICTIONAL STATEMENT

Jurisdiction is based on 28 U.S.C. §1254(1). The original judgment of the Court of Appeals was rendered on April 18, 1980; a timely filed motion for rehearing was denied by an order dated May 27, 1980, but superseded by a "corrected copy" on June 4, 1980.

APPLICAPABLE STATUTORY PROVISIONS

42 U.S.C. §2000e-2:

"(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color,

religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

STATEMENT OF THE CASE

On April 13, 1977, Franklin Smith (having satisfied the jurisdictional prerequisites) brought this action in the trial court, alledging employment discrimination on the basis of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. The case was called for trial on 26 April, 1979, and the plaintiff called only one witness, an employee of the defendant.1/

1/ Additionally, the plaintiff, by his physical presence in the courtroom, demonstrated to the Court that he was a member of a minority race; also, counsel stipulated as to the amount of back-pay which would be due if the plaintiff prevailed.

The record reveals that Franklin Smith, a black man, had been employed by Chrysler Corporation as a parts picker at its Atlanta Parts Depot for about 5 years, when he was discharged on January 26, 1975. He was not discharged because of any deficiency in his job performance, which was, admittedly, adequate, nor was he discharged because of any reduction in the force or general layoff. After his discharge, other employees were hired in his place. His attempts to reinstatement proving fruitless, he brought this action seeking reinstatement and back pay. As a result of the discharge, he lost back pay of approximately $12,408.60.

Franklin Smith, having presented that evidence, rested. The defendant moved for, and received, an involuntary dismissal; the plaintiff's motion for a new trial was denied, and he appealed. The U.S. Court of Appeals for the Fifth Circuit affirmed the trial court's judgment on April 18, 1980, and, on May 27, 1980, denied a timely filed motion for rehearing.

The thrust of the rulings, both in the trial court and in the Court of Appeals, is that the plaintiff in a Title VII case in order to prove a "disparate treatment" prima facie case, needed to prove, as part of that case, the race of the person ultimately hired for the position for which he was rejected.

JURISDICTION BELOW

Jurisdiction in the trial court was predicated on 42 U.S.C. §2000e-5, and 28 U.S.C. §1343.

ARGUMENT

The issue in this case is very simple, but it is also very important because the Fifth Circuit (following dictum in one of its earlier decisions) has placed an unwarranted burden on plaintiffs in employment discrimination cases who proceed on what is known as the "disparate treatment" theory.

The elements of this theory were first enunciated by this Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). This is what this Court said in Green:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that

> he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants for persons of complainant's qualifications. [footnote ommitted]
> 411 U.S. at 802; 93 SCt. at 1824.

The McDonnell Douglas holding was reiterated in Furnco Construction Corp. v. Waters, U.S. , 98 S.Ct. 2943 (1978). The explanation in Furnco of the formulation of the McDonnell Douglas prima facie case is helpful:

> A prima facie case under McDonnell-Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. [cit] And we are willing to presume this largely because we

> know from our experience that more often than not, people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.
> 98 SCt. at 2949-2950.

So, properly applied, the McDonnell Douglas scheme is very simple and rational. The alleged discriminatee does not have the impossible burden of proving the state of the defendant's mind; rather, by showing some very simple and objective facts, he can require the defendant to articulate the reason for the adverse action, thereby giving him a concrete target for his "pretext" rebuttal. As this Court recognized in Furnco, the real trial in a non-frivolous case would normally relate to the "pretext" rebuttal; only in the rarest of circumstances would the employer be unwilling to rebut the prima facie case by merely articulating a legitimate reason for his actions. So, in practice, the "prima facie case" concept is really nothing more than an orderly way of presenting the relevant truth.

But the Fifth Circuit, requiring a greater quantum of proof, has upset the McDonnell Douglas scheme. It has said that the plaintiff must prove something more -- it held that part of the prima facie case must include proof of the race of the person hired to replace the plaintiff. Specifically, this is what it said:

> [The witness] stated that, after the date on which Smith [the black plaintiff] was discharged, others were hired for the same job, but he was not asked and did not state the race of the replacing employees.
>
> To prove a prima facie case of Title VII racial discrimination and discharging of employees, the persons aggrieved must show that . . . (4) after they were discharged their employer filled the positions with nonminorities.[] Marks v. Prattco, Inc., 607 F.2d 1153, 1155 (5th Cir., 1979). Because Mr. Smith failed to introduce any evidence tending to prove the fourth element and presented no evidence at all concerning

> discrimination in work assignments, the district court was correct in dismissing for failure to establish a prima facie case.

The dictum quoted from Marks, however, was not a correct statement of the fourth element of a prima facie case [it happened in Marks, and undoubtedly often does, that the replacement employee was shown to be a nonminority, so the mis-statement in Marks was pure dictum]. This is what the fourth element really is:

> (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.
> McDonnell Douglas, supra, 411 U.S. at 482, 93 SCt. at 1824.

Decided cases also show that proof that the position was ultimately filled with a nonminority is not necessary. For example, in Smith v. Liberty Mutual Insurance Company, 595 F.2d 325 (5th Cir., 1978), the court stated that a prima facie

sex discrimination case had been shown, where there was no showing of the sex of the person actually hired. Similarly, in Jochum v. Schmidt, 570 F.2d 1129 (5th Cir., 1978), the court assumed that a prima facie race discrimination case had been made, where the black plaintiff had been replaced by another black person. But especially compelling is the decision in Powell v. Syracuse University, 580 F.2d 1150 (2nd Cir., 1978) where the black female plaintiff was held to have made out a prima facie case of both race and sex discrimination where the replacement employee was a white female.

The fourth element was, of course, reiterated by this court in Furnco Construction Corp. v. Waters, supra, where a prima facie case was held to have been presented where there was no showing as to the characteristics of those ultimately hired. And, in any number of other cases, it is clear that a showing of the characteristics of those ultimately hired was not necessary to the presentation of a prima facie case. See, for example, Garrett v. Mobil Oil Corp., 531 F.2d 892

(8th Cir., 1976); Marshall v. Airpax Electronics, Inc., 595 F.2d 1043 (5th Cir., 1979); Parsons v. Kaiser Aluminum Chemical Corp., 575 F.2d 1374, 1383 (5th Cir., 1978).

The plaintiff's position is the sensible approach, even aside from the fact that is mandated by the plethora of cases cited above. As another court has noted,

> A McDonnell Douglas prima facie showing is not the equivalent of a factual finding of discrimination; rather, it is simply proof of actions by an employer for which discriminatory animus may be inferred [cit.]. And to dispel the adverse inference from such a prima facie showing, the employer need only articulate some legitimate nondiscriminatory reason for his actions. Kentroti v. Frontier Airlines, Inc., 585 F.2d 967 (10th Cir., 1978).

In other words, this concept of allocation of burden of proof was formulated to focus the attention of the trier of fact on the

proper issue for decision. It embodied the rather basic presumption noted above: when an employer takes action adverse to a competent minority employee, we can presume a discriminatory motive unless the employer truthfully articulates a non-discriminatory reason. This formulation was made in response to a very practical problem: employers who discriminate tend not to say so. This sort of subjective motivation is very difficult to prove directly. However, it is easy to prove indirectly, because, presumably, every personnel decision made by an employer is made for a reason, and this reason is articulable. So, if an employer, given an opportunity to articulate a truthful non-discriminatory reason, does not do so, one is compelled to presume that it discriminated.2/

The showing (required by the 5th Circuit opinion) that the replacement employee be

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2/ The Fifth Circuit, in denying rehearing, also implied that the plaintiff had failed to prove that he was not qualified for the job; but it is clear from the record that he was not fired because of any lack of quality in his work.

a nonminority adds an extraneous element to the McDonnell Douglas test, which can, by mechanical application, lead to incorrect results. An obvious example comes to mind: it is quite conceivable that an employer would seek to discharge outspoken blacks, but tolerate outspoken whites and quiet blacks. Its replacement of an outspoken black person with a quiet black person under these circumstances would, under the opinion below, be acceptable. and yet, it is difficult to imagine a more repugnant sort of discrimination.

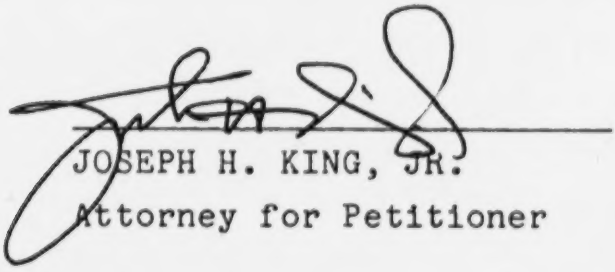
IMPORTANCE OF GRANTING REVIEW

This Court is being asked to do much more than merely reiterate standards already set in McDonnell Douglas and Furnco. It has a chance here to eliminate apparently considerable doubt as to what constitutes a prima facie case. Even aside from the ruling below, the reporters are filled with decisions in which either the district court, the appellate court, or both, was confused as to whether a prima facie case had been made -- and this confusion invariably detracts from the focus

on the ultimately-decisive issue.

CONCLUSION

The writ of certiorari should issue, and the judgment below should be reversed.

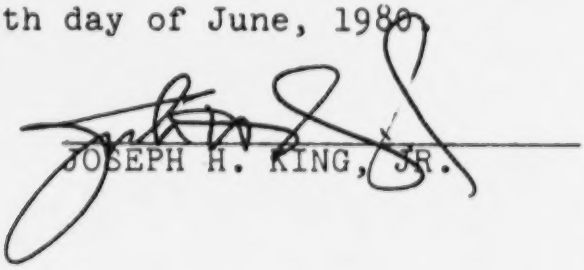


JOSEPH H. KING, JR.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this day served opposing counsel with three copies of the foregoing by mail.

This 29th day of June, 1980.



JOSEPH H. KING, JR.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3559
Summary Calendar*

FRANKLIN D. SMITH,
Plaintiff-Appellant,

verses

CHRYSLER CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

(April 18, 1980)

Before GEE, RUBIN and POLITZ, Circuit Judges.

PER CURIAM:

Mr. Franklin D. Smith was a black employee of Chrysler Corporation at its

Atlanta Parts Depot. In January, 1975, he was discharged. He now charges that his work assignments at the Atlanta Parts Depot and his eventual discharge were the result of racial discrimination. The case was tried on April 26, 1979. After plaintiff rested, the trial court dismissed his suit on the basis that the evidence he presented did not support any inference of discrimination and that, therefore, it did not establish a prima facie case. Finding that the conclusion of the trial court was warranted by the lack of evidence, we affirm.

Mr. Smith called only one witness, Primm, the manager of Chrysler's parts depot. Primm gave no testimony about discrimination in work assignments. Primm did testify that Smith was employed at the depot until about January 15, 1975, that Smith was not discharged because of unsatisfactory job performance and that there was no general layoff or reduction of the workforce at the depot at the time of Smith's discharge. Primm was not asked the reason for the discharge. He stated that, after the date on which Smith was

discharged, others were hired for the same job, but he was not asked and did not state the race of the replacing employees.

To prove a prima facie case of Title VII racial discrimination in the discharging of employees, the persons aggrieved must show that "(1) they are members of a protected minority; (2) they were qualified for the jobs from which they were discharged; (3) they were discharged; and (4) after they were discharged their employer filled the positions with nonminorities." Marks v. Prattco, Inc., 607 F.2d 1153, 1155 (5th Cir., 1979). Because Mr. Smith failed to introduce any evidence tending to prove the fourth element and presented no evidence at all concerning discrimination in work assignments, the district court was correct in dismissing for failure to establish a prima facie case.

The opening statement of counsel showed familiarity with the requirement that the aggrieved person make out a prima facie case. Counsel indicated that he would present a prima facie case of racial

discrimination, wait for Chrysler to offer evidence that the discharge was justified and then prove the lack of justification in rebuttal. After the plaintiff rested, the motion to dismiss was argued, based on his failure to prove a prima facie case. Mr. Smith's counsel said he had consulted with his client and relied only on the argument that enough evidence had been adduced. No more evidence was proffered and no effort was made to ask for an opportunity to adduce more, despite the court's offer to allow counsel to reopen his case. Instead, counsel said, "I think that the plaintiff is going to stick by his guns on his earlier position."

The gauntlet was flung on the legal issue. Finding the trial judge's conclusion on it correct, we AFFIRM.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3559

FRANKLIN D. SMITH,
Plaintiff-Appellant,

verses

CHRYSLER CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion April 18, 1980, 5 Cir., 1980, _____ F.2d _____).

(May 27, 1980)

Before GEE, RUBIN and POLITZ, Circuit Judges.

PER CURIAM:

The application for rehearing raises the issue whether the criteria for a prima facie test of discrimination in hiring set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), referred to by us in Marks v. Prattco, Inc., 607 F.2d 115 (5th Cir., 1979), should be applied without further modification to a discharge case and whether these criteria state the sole way to prove a prima facie case. The McDonnell Douglas test was applied to a discharge contested under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, in Loeb v. Textron, Inc., 600 F.2d 1003, 1012 (1st Cir., 1979). The court said:

> "To apply the above concept in the present case, which involves firing, not hiring, the critical elements (beyond being within the protected class, i.e., age 40-65, and fired) must be modified to produce an analogous inference. Complainant would be required to show that he was

"qualified" in the sense that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative. See Teamsters, 431 U.S. at 358 N.44, 97 S.Ct. 1843. He would also have to show that his employer sought a replacement with qualifications similar to his own, thus demonstrating a continued need for the same services and skills. Without proof along these lines, the conceptual underpinnings of McDonnell Douglas would not remain recognizable. Proof beyond this, however, is not mandated by McDonnell Douglas, and does not fit its conceptual underpinnings as described in Furnco and Teamsters. A correct statement of the elements of a McDonnell Douglas prima facie case, adapted to present circumstance, therefore would have been that Loeb had to prove that he was in the protected age group, that he was performing his job at a level that met with his employer's legitimate expectations, that he nevertheless was fired, and that

> Speidel sought someone to perform the same work after he left."

It was not necessary in Marks for us to go beyond the criteria listed because we found a prima facie case established. Cf. Ramirez v. Sloss, 615 F.2d 163, 168 n.9 (5th Cir., 1980) (Marks criteria are not the only way to establish prima facie case of discriminatory discharge). It may well be that the formulation in Loeb would be adopted in an appropriate case. However, even by this test the plaintiff's proof was not enough. The plaintiff offered no evidence that he was performing the job at a level that met his employer's legitimate expectations. He proved only that he was black, had been discharged and that this was not, so far as the depot manager knew, for poor job performance or as a result of a reduction in force. The plaintiff carefully refrained from asking the depot manager (the sole witness called) whether he had been discharged for any other reason, however sound, and from offering testimony that his service as an employee met a satisfactory level.

The application for rehearing is, therefore, DENIED.

No member of this panel nor judge in regular active service on the court having requested that the court be polled in rehearing en banc, Fed. R. App. P. 35; Local 5th Cir. Rule 16, the suggestion for rehearing en banc is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FRANKLIN D. SMITH,	)	
	)	
Plaintiff,	)	
vs.	)	Civil Action No.
	)	C77-587A
CHRYSLER CORPORATION,	)	
	)	
Defendant.	)	

ORDER

This civil action is brought pursuant to 42 U.S.C. §2000(e), et seq., charges the defendant, Chrysler Corporation, with racial discrimination gainst the plaintiff, a black former employee of Chrysler Corporation. The plaintiff's complaint essentially charges Chrysler Corporation with racial discrimination in the assignment of work at its Atlanta Parts Depot, and with racial discrimination in the termination of the plaintiff's employment on or about January 17, 1975.

This case was tried by the Court without a jury on April 26, 1979. In attempting to establish a prima facie case of racial discrimination, the plaintiff presented only the testimony, on cross examination, of Mr. H.L. Primm, Manager of Chrysler's Atlanta Parts Depot, and Plaintiff's Exhibit No. 1, a seniority listing of hourly paid employees dated November 1, 1974. Though Plaintiff's Exhibit No. 1 was identified by Mr. Primm, it was never offered or accepted into evidence.

After concluding his cross examination of Mr. Primm, the plaintiff's counsel rested his case. Counsel for tne defendant then moved for an involuntary dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure on the ground that the plaintiff had not established a prima facie case entitling him to relief for racial discrimination. After hearing the argument of counsel respecting Chrysler's motion for involuntary dismissal the Court announced its intention to grant Chrysler's motion. The Court, however, advised plaintiff's counsel that it would allow the plaintiff to reopen his

case and present additional evidence toward the establishment of a prima facie case of racial discrimination. At the Court's suggestion a brief recess was taken to afford plaintiff's counsel the opportunity to consider reopening the plaintiff's case and presenting additional evidence. When the trial was resumed plaintiff's counsel declined to reopen the plaintiff's case,and the Court granted Chrysler's motion for involuntary dismissal.

In granting Chrysler's motion for involuntary dismissal, the Court adopts the following findings of fact. The plaintiff belongs to a racial minority. The plaintiff was discharged from his employment. The plaintiff was not discharged on the basis of his job performance.

Since the Court finds that the plaintiff failed to establish a prima facie case of racial discrimination, it is equally important to note here what the plaintiff's evidence did not show. Though the employment vacancy created by the plaintiff's discharge was subsequently filled, the

plaintiff introduced no evidence indicating that he reapplied for employment or indicating the race of the person hired to fill the job vacancy opened by the plaintiff's discharge. The plaintiff introduced no evidence whatsoever supporting his contention in paragraph 5 of his complaint that he had "routinely been assigned only the more difficult chores by supervisory personnel, who were of an different race." The plaintiff introduced no evidence indicating or suggesting any disparate treatment of minority and non-minority employees in the assignment of work at Chrysler's parts depot. Finally, with respect to the reason advanced by Chrysler for the plaintiff's discharge -- i.e., the plaintiff's insubordinate and threating conduct -- the plaintiff offered no evidence suggesting that non-minority employees had been treated any differently than minority employees with respect to such conduct.

In granting Chrysler's motion for involuntary dismissal, the Court adopts the following conclusions of law. The plaintiff carries "the initial burden of show-

ing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'" Furnco Construction Corp. v. Waters, 57 L.Ed. 2d 957, 966 (1978). In order to raise an inference of racial discrimination, however, the plaintiff was obliged to show that he was treated differently than non-minority persons otherwise similarly situated. Potter v. Goodwill Industries, 10 F.E.P. Cases 1485, 1486 (6th Cir., 1975). In this case, the Court finds that the plaintiff's evidence failed as a matter of law to raise any inference of racial discrimination.

The plaintiff's complaint charges Chrysler with racial discrimination in two forms: (1) the assignment of work orders, and (2) the plaintiff's discharge. With respect to the assignment of work orders, the plaintiff adduced no evidence whatsoever showing any disparate treatment of racial minorities in the assignment of work orders. Indeed, the plaintiff offered no evidence at all concerning the

assignment of work orders in the parts depot.

With repsect to his discharge from employment, the plaintiff offered only the evidence that he belongs to a racial minority, that he was discharged, and that his discharge was not based on his job performance. Such evidence, however, merely establishes a single factor upon which Chrysler did not act in discharging the plaintiff. It does not suggest in any way that Chrysler's actions in discharging the plaintiff were racially motivated, or that the factors upon which Chrysler did act in discharging the plaintiff were not appled equally to all employees.

This Court does not believe that the discharge of a minority employee, whose job performance is satisfactory, automatically raises an inference of racial discrmination. Indeed, such a rule would be tantamount to holding that an employer cannot discharge an employee for legitimate, non-discriminatory reasons wholly unrelated to the employee's satisfactory performance of his assigned tasks. Until

the employer's reason for discharge is shown to have a disparate impact upon minorities or is shown to have been applied differently as between minority and non-minority employees, no inference of racial discrimination arises. In this case, Chrysler's Third Defense to the plaintiff's complaint states unequivocally that the plaintiff was discharged for insubordinate and threatening conduct. The plaintiff, however, did not show nor even suggest that non-minority employees were not discharged for similar conduct. In essence, plaintiff wholly failed to show or suggest any action by Chrysler in which it treated the plaintiff or other minority employees any differently than it treated non-minority employees.

On the basis of the foregoing findings of fact and conclusions of law, Chrysler's motion for involuntary dismissal is hereby granted.

IT IS SO ORDERED, this 18th day of May, 1979.

HAROLD L. MURPHY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

U.S.D.C. - Atlanta

FRANKLIN D. SMITH, CIVIL ACTION

Plaintiff,

v.

CHRYSLER CORPORATION, NUMBER C77-587A

Defendant.

ORDER

On May 21, 1979, the Court entered judgment for the defendant, Chrysler Corporation, in this employment discrimination action, brought pursuant to 42 U.S.C. §2000(e) ("Title VII"). Plaintiff Franklin D. Smith has now moved that the Court's judgment of dismissal be vacated and that he be afforded a new trial pursuant to FED. R. CIV. P. 59(a).

At the trial of this action, the Court

directed a verdict for defendant Chrysler at the close of plaintiff's evidence on the ground that plaintiff Smith had failed to make out a prima facie case of employment discrimination. Through one witness plaintiff produced evidence that he was a member of a protected minority, a black person; that he had been employed by Chrysler for several years prior to his discharge in January, 1975; that his discharge was not due to inadequate job performance; and that there was no general reduction in defendant's work force.

Plaintiff now contends that this evidence is sufficient to support the inference that his discharge resulted from the racially discriminatory animus of the defendant relying on McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973) and Furnco Construction Corporation v. Waters, 438 U.S. 567 (1978). However, as the Supreme Court noted in Furnco, McDonnell Douglas did not establish an inflexible rule with respect to making out a prima facie case of employment discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 567, 575-76 (1978). What

McDonnell Douglas did make clear is that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under the Act." Id. at 576; International Brotherhood of Teamsters v. United States, 431 U.S. 344, 358 (1977). A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these facts, if otherwise unexplained, are more likely than not based upon the consideration of impermissible factors. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

In the instant case, the Court has specifically noted in its order of dismissal the lack of evidence indicating the race of the person hired in his place. In the absence of this evidence, the Court will not presume that it is more likely than not that plaintiff's discharge was based on the consideration of impermissible factors. See Flowers v. Crouch-Walker Corp., 522 F.2d 1277 (7th Cir., 1977).

ACCORDINGLY, plaintiff's motion for a new trial is denied.

SO ORDERED, this 26th day of September, 1979.

HAROLD S. MURPHY
UNITED STATES DISTRICT JUDGE